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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6992

RONALD PAUL BISHOP,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE ARIZONA STATUTE GOVERNING THE IMPOSITION OF THE DEATH PENALTY VIOLATE THE EIGHTH AMENDMENT BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE CHARACTER AND RECORD OF THE OFFENDER AS A MITIGATING FACTOR?

II. WAS PETITIONER DENIED DUE PROCESS FAIRNESS OR THE EQUAL PROTECTION OF THE LAWS WHEN THE COURT DETERMINED THE VICTIM WAS KILLED IN A CRUEL OR HEINOUS MANNER? DID THE COURT IMPROPERLY IMPOSE THE DEATH PENALTY AFTER DETERMINING THAT AN AGGRAVATING CIRCUMSTANCE EXISTED -- TO WIT, THE CRUEL MANNER OF DEATH?

III. WAS BISHOP IMPROPERLY DENIED EITHER HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF OR HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE PROCEEDED TO COOPERATE IN A VIDEOTAPED WALK-THROUGH OF THE CRIME WITH LAW ENFORCEMENT AUTHORITIES WHICH STATEMENTS AND EVIDENCE WERE SUBSEQUENTLY ADMITTED AT TRIAL?

STATEMENT OF THE CASE

On January 18, 1976, petitioner, Ronald Paul Bishop, victim Norman Troxell, Fred Van Haelst, Catherine Leckliter, and Catherine's 2-year-old daughter met at the Salvation Army Welfare Center on 9th Avenue in Phoenix. (R.T., Vol. III at 303, Vol. IV at 535.) Norman Troxell was the only one of these individuals who had a car, a 66 Chevrolet Caprice. (R.T., Vol. III at 307.) They decided to travel together. (Id. and R.T., Vol. IV at 539.) On January 20 the group left Phoenix and traveled to the Bumble Bee area near Prescott. (R.T., Vol. III at 308, R.T. June 10, 1976 at 14.) They camped out in the open that evening. During the course of that evening Bishop, Leckliter, and Van Haelst discussed the problem of Troxell's continual drinking. (R.T., Vol. III at 310, Vol. IV at 546, June 10, 1976 at 15.) Troxell was apparently drunk all of the time, and spent most of the time sleeping in the back seat of the vehicle. (R.T., Vol. IV at 542.) In the conversation concerning Troxell's condition, Van Haelst suggested they could "try to sober him up." (R.T., Vol. III at 310.) Bishop said that would do no good, and that they would have to "get rid of him" or "do him in." (Id. and R.T., June 10, 1976 at 16.) There was further conversation along the same lines, the following day. (Id.) Bishop stated they had to do Troxell in because they needed the car. (R.T., June 10, 1976 at 16.)

On the morning of January 22, Bishop told Van Haelst that "he had found the perfect place to put him in." (R.T., Vol. III at 313 and 316.) The party went into town for groceries, then returned to the campsite. Van Haelst, at Bishop's direction, told the woman, Leckliter, to take the little girl and go for a walk. (R.T., Vol. III at 317, June 10, 1976 at 16.) Troxell was sleeping in the car. Bishop went over by the car, and asked Troxell to get out of the car. (R.T., Vol. IV at 555, June 10,

1976 at 17.) Troxell got out and went to the back of the vehicle to urinate. (R.T., June 10, 1977 at 17.) At that time Bishop struck Troxell on the head with a hammer. As Troxell went down Bishop struck him at least once more. (Id. at 17-20.) Bishop removed Troxell's wallet, watch, and shoes. (Id. at 20 and R.T., Vol. IV at 564.) Then Bishop hog-tied Troxell's feet with rope. Bishop had taken the rope off a dead cow earlier, and placed it in the trunk. (R.T., June 10, 1976 at 21; Vol. IV at 566.) Bishop and Van Haelst dragged Troxell toward a mine shaft. Troxell was gasping and still alive. (R.T., June 10, 1976 at 22.) Bishop put Troxell on the edge of the hole, believing Troxell would fall in the hole because Troxell was still alive and struggling. [Statement of Appellant Bishop (State's Exhibit 3 for Voluntariness Hearing, admitted into evidence at R.T., Vol. I at 76]; also R.T., Vol. IV at 569.) He fell into the mine shaft. (Id.) Bishop then threw rocks up to a foot and half in diameter into the hole on top of Troxell, who Bishop said was then wiggling around or trying to get up. [State's Exhibit 6 for Voluntariness Hearing (transcript of videotape); also R.T., June 10, 1976 at 23.)

Following the murder of Troxell, Bishop and the others traveled in Troxell's car to Oregon, and finally to Texas. An identification of the murder victim's body caused a nation-wide bulletin to be issued giving the description and license number of the Troxell vehicle. (R.T., Vol. I at 26.) Texas law enforcement officers spotted the car, and stopped and arrested its occupants, Bishop and Leckliter, at which time Bishop received the Miranda warnings. (R.T., Vol. I at 59.) Upon arrival at the police station, Bishop was again given the Miranda warnings. (R.T., Vol. I at 60.) Texas law required that Bishop immediately be given Miranda warnings by a Magistrate.

This was done, Bishop being advised in person by the Magistrate and signing a written form explaining the rights. (R.T., Vol. I at 61-63, State's Exhibit for Voluntariness Hearing.)

Bishop had had Leckliter draw up a false bill of sale for the Troxell vehicle. (R.T., Vol. III at 305 et seq., Testimony of Leckliter.) Initially, Bishop stated that the most the law enforcement officers had on him was stolen vehicle. (R.T., Vol. I at 65.) Subsequently Bishop made a statement to the Texas authorities. Before making it he was reminded of his Miranda rights. In it he claimed Troxell was alive when he left him. (R.T., Vol. I at 65, State's Exhibit 2 for Voluntariness Hearing.)

Catherine Leckliter abandoned the store about the false bill of sale, and confessed to authorities her knowledge of what went on. (R.T., Vol. I at 57.)

At a second interview, prior to which Bishop was again reminded of his Miranda rights, Yavapai County Prosecutor Robert Keubler was present. (R.T., Vol. I at 70.) At one point in the interview, Bishop learned that Van Haelst had been apprehended. At that point he stated that he wished to talk to Kuebler in private. (R.T., Vol. I at 72 and 107.) The law enforcement officers left the room, but Detective Stephens did not leave the area. (R.T., Vol. I at 107.) Leaving the door cracked, Detective Stephens remained just outside within 2-3 feet of appellant where he could see Bishop and hear what was said. (R.T., Vol. I at 108.) He heard Bishop say "I might as well tell the truth. I was lying about that other statement." (R.T., Vol. I at 108.) Then Detective Stephens heard Bishop tell Kuebler what really happened. (R.T., Vol. I at 109.)

After about 5 mintues, the law enforcement officers were asked back into the room. (R.T., Vol. I at 110.) At that point Bishop repeated his new statement to the officers. The statement was typed up from notes made by the officer and the

prosecutor. (R.T., Vol. I at 74-76.) Bishop read the statement, which included once more, the Miranda warnings, and signed it. (Id. and State Exhibit 3 for Voluntariness Hearing.)

Upon being returned to Arizona, Bishop agreed to a video-taped "walk-through" at the scene of the murder. He was advised of his Miranda rights prior to reaching the area, and told they intended to film the walk-through. (R.T., Vol. I at 33 and 47.) At the area before filming, he was asked whether he had been advised of those rights and responded that he had been. (R.T., Vol. I at 135.) Bishop identified the type of hammer he had used, and showed the officers where the events of the murder had occurred. (R.T., Vol. I at 131-68.)

After a trial by jury, Bishop was found guilty of the first degree murder of Norman Troxell. (See Minute Entry dated May 19, 1976 at 3.) An aggravation-mitigation hearing was held, following which the trial court found that the murder had been committed in an especially heinous, cruel, or depraved manner. The court further found no mitigating factors sufficient to call for leniency. (R.T., Vol. V at 38-42.) The death penalty was therefore imposed. Bishop's conviction and sentence of death were affirmed by the Arizona Supreme Court on March 1, 1978. State v. Bishop, ____ Ariz. ____, 576 P.2d 122 (1978).

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ARGUMENT

I

THE ARIZONA STATUTE GOVERNING THE IMPOSITION OF THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE CHARACTER AND RECORD OF THE OFFENDER AS A MITIGATING FACTOR.

Petitioner contends that the Arizona death penalty law is unconstitutional because it improperly limits the mitigating factors the court may evaluate, and focuses on the nature of the offense itself rather than the character of the offender. Petitioner urges that Arizona's death penalty provision does not resemble the statutory schemes of states whose death penalty provisions have been upheld by this Court.

The United States Supreme Court granted a petition for writ of certiorari in Jordan v. Arizona, No. 76-6965 (U.S., July 3, 1978), a death penalty case. The United States Supreme Court vacated that portion of the opinion of the Arizona Supreme Court that left undisturbed the death penalty imposed on petitioner Jordan. The court remanded the case to the Arizona Supreme Court for proceeding in harmony with Lockett v. Ohio, 438 U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1978).

On July 20, 1978, the Arizona Supreme Court issued its opinion in State v. Watson, No. 3089 (July 20, 1978), a death penalty case, which challenged the number and type of mitigating factors utilized by the court in fixing capital punishment. (See Attachment A.) In the Watson decision, the Arizona Supreme Court determined the statutory restriction on the presentation of mitigating factors pursuant to Ariz.Rev. Stat.Ann. § 13-454 was unconstitutional. In view of the fact Ariz.Rev.Stat.Ann. § 13-454 (under which petitioner was sentenced) is now deemed invalid, it appears petitioner's recourse is in some state judicial hearing. Respondent submits it is presently unnecessary for the United States Supreme Court to consider petitioner's

application for writ of certiorari since the primary issue upon which he relies, Issue I, is moot.

ARGUMENT

II

PETITIONER WAS NOT DENIED DUE PROCESS FAIRNESS OR THE EQUAL PROTECTION OF THE LAWS WHEN THE COURT DETERMINED THE VICTIM WAS KILLED IN A CRUEL OR HEINOUS MANNER. THE COURT DID NOT IMPROPERLY IMPOSE THE DEATH PENALTY AFTER DETERMINING THAT AN AGGRAVATING CIRCUMSTANCE EXISTED -- TO WIT, THE CRUEL MANNER OF DEATH.

Bishop contends that the aggravating circumstance of Ariz. Rev.Stat.Ann. § 13-454 of a cruel or heinous slaying which warrants the imposition of the death penalty, is not harmonious with the constitutionally valid death penalty statute and former cases of Florida.

Following the trial and aggravation hearing in this matter, the trial court pronounced sentence in petitioner Bishop's case. In regard to the aggravating circumstances the court stated:

> "In determining aggravating circumstances I have considered only evidence admitted at the trial of this case and [evidence] governed by the Rules for the admission of evidence at the criminal trial.
>
> * * *
>
> "Pursuant to A.R.S. 13-454E, as to aggravating circumstances, I find as follows:
>
> * * *
>
> "I do find that you committed the offense in an especially heinous, cruel or depraved manner.
>
> "Mr. Bishop, I find your murder of Norman Troxell was a malicious, premeditated, vicious act designed to inflict a high degree of pain with utter indifference for the suffering or regard for human life. Your use of a hammer as the murder weapon was cruel; it was designed to inflict, and did inflict a high degree of pain.
>
> "Your crime was unnecessarily torturous to the victim because he was apparently alive when you tied his feet and pulled him along

the ground to the mine shaft. You left Mr. Troxell later to return and find him at the bottom of the shaft wherein you proceeded to throw rocks and dirt on him.

"Your act lacked any moral sense, any appreciation for life.

"What you did was vicious beyond the comprehension of the ordinary person.

"What you did was outrageously cruel and heinous and done in a depraved manner."

(R.T., Vol. V at 38-41.)

Bishop contends that the murder of Troxell was not cruel and heinous since the pathologist did not so characterize that slaying. Dr. Phillip Keen, the Yavapai County Coroner, testified Troxell died from multiple skull fractures. The doctor stated that approximately simultaneous with the head injuries, Troxell's leg was broken. (R.T., Vol. II at 280-90.) Bishop has not cited any authority for his theory that a cruel and heinous murder can only be established by medical testimony. In the matter sub judice it was unnecessary to examine the doctor on the quality and type of death Troxell met, since petitioner by his own words and recollection of the events surrounding the killing gave facts which demonstrated the murder was indeed heinous and cruel.

According to Bishop's own statements his victim was slowly killed:

"He turned sideways and I hit him in the front part of the head with the hammer. It wasn't actually that hard. I hit him a second time in the back of the head. He fell but he wasn't unconscious.

"I heard someone say 'there's a truck coming,' so I put the rope around his feet and gradually pulled him down to where the open shaft was. That was about fifty feet. The shaft was about eight or nine feet deep. I put Norman on the side of the hole. He was struggling and he fell into the hole. I believed he would fall into the hole."

(Statement by appellant, R.T., Vol. I at 414, State's Trial Exhibit 16 admitted into evidence at R.T., Vol. I at 411.) (Emphasis added.)

And:

> "Bishop: He was dragged down the road where at that time he was still alive. Ah, he was dragged by the edge of this here and let down slowly with my hands on him so he wouldn't roll fast enough to hit his head on anything. Like I repeat to say, he was still alive at that time and he was laying cross-ways with his head this way and his feet were tied at that time. . . . After dragging him down or gradually letting him down the hill, he was placed on this spot here. I'd say approximately one . . . two feet from the entrance of the pit. The pit. We call that pit a hole. I went back up to the top of the hill to check to see if any vehicles was coming down, where there wasn't. When I remained back down here he was in the hole . . . uh . . . by wiggling around or trying to get up, one or the other. So to cover up this - . . uh . . . body or the clothing, there was rocks placed on top of him . . . uh loose sand and loose rocks."
>
> (Transcript of Videotape, State's Trial Exhibit 19A, admitted into evidence at R.T. Vol. IV at 532.) (Emphasis added.)

And:

> "Q. And what was done with Mr. Troxell at that time?
>
> "A. He was drug from behind the car.
>
> * * *
>
> "Q. Can you describe what you saw, what his physical condition was?
>
> "A. He was gasping. He was still alive. . . ."
>
> (Testimony of Fred Van Haelst, R.T., June 10, 1976 at 22.) (Emphasis added.)

Thus, after a 2 day discussion, Bishop decided to kill Norman Troxell because Troxell was a drunk, and also because Bishop wanted Troxell's car. Bishop struck his victim with a hammer while the victim, half drunk and unaware of the impending blow, was urinating. When the victim fell, moaning, to his knees, Bishop struck him on the head with the hammer a second time. Using a piece of rope taken from a dead cow, Bishop dragged his

victim, who was still alive and gasping, to the edge of an empty mine shaft. While Bishop went to check for possible observers, the victim, who was struggling and writhing near the edge of the hole, fell helplessly into the abandoned shaft. Bishop returned and finding his victim already in the hole, proceeded to throw gravel and rocks, some as large as 1 foot in diameter on top of the victim. Bishop then proceeded calmly away from the scene in the victim's car, for which he subsequently forged a bill of sale. The record therefore shows the trial court correctly determined that the killing of Norman Troxell was done in an especially heinous, cruel and depraved manner. Ariz.Rev.Stat.Ann. § 13-454(E)(6).

Bishop's citation to the Florida cases of State v. Dixon, 283 So.2d 1 (Fla. 1973); Swan v. State, 322 So.2d 485 (Fla. 1975), Alford v. State, 307 So.2d 433 (Fla. 1975), are not useful to the resolution of the issue he raised and do not support his legal theory. In each of the foregoing cases, the Florida Supreme Court reviewed the imposition on the death penalty upon an offender who murdered his victim in a manner determined by the court to be cruel or heinous. Those cases do not demonstrate the infirmity of the similar Arizona death penalty statute. Those Florida cases do not indicate Bishop was denied due process fairness when the trial court determined Troxell met his death in a cruel and heinous way.

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ARGUMENT

III

BISHOP WAS NOT IMPROPERLY DENIED EITHER HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF OR HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE PROCEEDED TO COOPERATE IN A VIDEOTAPED WALK-THROUGH OF THE CRIME WITH LAW ENFORCEMENT AUTHORITIES WHICH STATEMENTS AND EVIDENCE WERE SUBSEQUENTLY ADMITTED AT TRIAL.

Bishop urges that the court erred in allowing evidence of his statements at a videotaped interview to be admitted. Bishop has not advanced any legal theory or appropriate citations to authority to support this hypothesis.

The record below indicates that Bishop was advised of his Miranda rights prior to the walk-through, and indicated he understood them. (R.T., Vol. I at 33-34, 147, 170.) The purpose of the walk-through and the fact of videotaping were explained to him prior to advising him of the Miranda rights. (R.T., Vol. I at 34, 43, 46-48, Vol. IV at 581.) Bishop was cooperative in allowing the videotape. (R.T., Vol. I at 148.) Detective Meritt testified: "I do recall him [Bishop] indicating his agreement as he did on film, to go along with the filming." (R.T., Vol. I at 172.) Finally, Bishop stated:

> "Okay, before this started ah, I was advised of my right to stay silent and not to have anything said not unless I wanted an attorney present. I broke the violation of my rights and wanted to get everything on tape and sound to have a closed hearing."
>
> (Transcript of videotape, State's Trial Exhibit # 19A.)[1]

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[1] Bishop's reference to a "closed hearing" apparently referred to the possibility that he could get a closed trial because of his fear of retribution by the victim's family. (See R.T., Vol. I at 203, Vol. IV at 587.)

The preponderance of the evidence supports the trial court's determination that Bishop's participation in the videotaped walk-through was voluntary and was done with the understanding that, pursuant to Miranda warnings, his statements and actions on the tape could be used against him at trial.

The trial court correctly denied Bishop's motion to suppress. Bishop was not improperly denied any constitutional right.

CONCLUSION

The petition for writ of certiorari should be denied for one or more of the foregoing reasons.

Respectfully submitted,

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